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No. 01-1616

Supreme Court, U.S.
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In The
Supreme Court of the United States

MICHAEL COMFORT, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

PHU CHAN HOANG, THANH QUOC NGUYEN, and PHAM QUA TRUNG,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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STATEMENT

This case presents a narrow issue: whether the government can mandatorily detain a broad group of criminal aliens, many convicted of relatively minor crimes, without any individualized determination that their detention is warranted because they pose a danger or flight risk. At issue in this case is not the government's authority to remove aliens who have been convicted of certain crimes, nor its authority to use detention to effectuate removal, *i.e.*, to detain individuals who might otherwise flee or present a danger to the community. Rather, the only question is whether Congress has chosen a constitutionally permissible means to effectuate these goals, mandatory detention under 8 U.S.C. 1226(c).

As this Court recently reiterated in *Zadvydas v. Davis*, although Congress has "'plenary power' to create immigration law . . . that power is subject to important constitutional limitations." 533 U.S. 678, 695 (2001) (citations omitted). Consistent with *Zadvydas*, the court of appeals correctly held that Section 1226(c)'s requirement of detention without any individualized determination of danger or flight risk violates due process. The court of appeals' ruling does not prevent the government from detaining any alien who presents a danger or flight risk, or from placing the burden on aliens to demonstrate lack of danger and flight risk. It merely requires some individualized determination rather than a blanket and categorical presumption that cannot be refuted. Indeed, current regulations – which are in no way affected by the court of appeals' ruling – *require* that the Attorney General detain any alien who cannot demonstrate lack of danger and flight risk.

A. 8 U.S.C. 1226(c).

The statute at issue in this case, 8 U.S.C. 1226(c), governs the detention of criminal aliens pending proceedings to determine if they are deportable from the United States. The statute requires the Immigration and Naturalization Service (INS) to take into custody any alien who "is deportable" from the United States based on having been convicted of any of a wide range of crimes. *See* 8 U.S.C. 1226(c)(1)(B) & (C). It then prohibits the INS from releasing any such individual (except under very narrow circumstances involving witness protection), *see* 8 U.S.C. 1226(c)(2), even individuals like the three respondents here, who are longtime lawful permanent residents of the United States, who are eligible for various forms of relief from removal, and who were subsequently determined to pose no danger or flight risk that requires their detention.

Both before and after Section 1226(c)'s enactment, the government expressed discomfort with the statute's broad mandatory detention requirement.[1] Largely because of these concerns, the INS persuaded Congress to defer

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[1] Letter from Andrew Fois, former Assistant Attorney General, to Robert Dole, then-Senate Majority Leader (April 16, 1996) (Ex. Q of Petitioner-Appellee's Brief before the court of appeals) (strongly opposing mandatory detention provision and noting that existing law, which authorized discretionary release of lawfully admitted aliens who could show lack of danger and flight risk, "permit[ted] the appropriate allocation of resources to [the] objective of removing criminals and other deportable aliens"); Letter from Jon P. Jennings, former Acting Assistant Attorney General, to the Honorable Albert Gore, Jr., then-President of the Senate (June 10, 1999) (Ex. G of Petitioner-Appellee's Brief before the court of appeals) (noting that "in some respects, the [statute] went too far" and urging Congress to restore the Attorney General's discretion to release certain aliens).

implementation of Section 1226(c) for two years, and to replace it with "Transition Period Custody Rules" (TPCR). *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 303(b), Pub. L. No. 104-208, 110 Stat. 3009-586.[2] These rules, which were in effect from October 1996 until October 1998, permitted the Attorney General to release lawfully admitted criminal aliens who

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[2] IIRIRA 303(b)(3) provides:

(A) In general. – During the period in which this paragraph is in effect pursuant to paragraph (2), the Attorney General shall take into custody any alien who –

(i) has been convicted of an aggravated felony (as defined under section 101(a)(43) of the Immigration and Nationality Act, as amended by section 321 of this division),

(ii) is inadmissible by reason of having committed any offense covered in section 212(a)(2) of such Act,

(iii) is deportable by reason of having committed any offense covered in section 241(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of such Act (before redesignation under this subtitle), or

(iv) is inadmissible under section 212(a)(3)(B) of such Act or deportable under section 241(a)(4)(B) of such Act (before redesignation under this subtitle), when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(B) Release. – The Attorney General may release the alien only if the alien is an alien described in subparagraph (A)(ii) or (A)(iii) and –

(i) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding, or

(ii) the alien was not lawfully admitted to the United States, cannot be removed because the designated country of removal will not accept the alien, and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.

could demonstrate that they were neither a danger nor flight risk. IIRIRA 303(b)(3)(B)(i).

The INS sought an extension of the TPCR based on their success in increasing criminal alien removal as well as INS' continuing concern that Section 1226(c)'s broad detention mandate would undermine INS enforcement efforts.[3] This effort was unsuccessful and Section 1226(c) took effect in October 1998. Legislation is currently pending in the House Judiciary Committee that would restore the Attorney General's discretion to release from detention certain lawful permanent residents who can demonstrate that they pose neither a danger nor flight risk. *See* H.R. 1452, 107th Cong. (2001). This legislation would apply to all three of the respondents, thereby mooting this case.[4]

Numerous regulations govern the detention and release of aliens, wholly apart from Section 1226(c), and continue to apply to the respondents. In all cases where an alien is eligible for release consideration, the INS

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[3] *See* Immigration and Naturalization Oversight: Hearings on INS Reform: Detention Issues Before the Senate Subcomm. on Immigration, Comm. on the Judiciary, 1998 WL 767401 (F.D.C.H.), 105th Cong. (1998) (testimony of Doris Meissner, former Comm'r, INS).

[4] Section 2(a) of the proposed legislation, titled "Cancellation of Removal for Certain Permanent Residents," authorizes discretionary release of longtime lawful permanent residents who have not been convicted of aggravated felonies for which they were sentenced to five years, or in the case of indeterminate sentences, for which they served five years. H.R. 1452, 107th Cong. (2001). Section 2(b) of the legislation, titled in part, "Cancellation of Removal for Certain other Permanent Residents," authorizes discretionary release of longtime lawful permanent residents who, although convicted of a disqualifying aggravated felony, would nonetheless be eligible under the provision to apply for cancellation of removal based on "urgent humanitarian reasons or significant public benefit." *Id.*

makes an initial determination whether an alien poses a danger or flight risk and whether to allow release on bond. 8 C.F.R. 236.1(c)(8). That determination may be reviewed by an immigration judge at a hearing at which the INS may demonstrate why the alien should not be released on bond. 8 C.F.R. 3.19(a), (d). If the immigration judge grants release, the INS can appeal the decision to the Board of Immigration Appeals (BIA) and seek an emergency stay of the release order pending appeal. 8 C.F.R. 3.19(f), 3.19(i)(1), 3.38. Significantly, the INS may, in any case, invoke an "automatic stay" of an immigration judge release order, thereby preventing the alien's release pending the BIA's ruling on the INS' bond appeal. 8 C.F.R. 3.19(i)(2).[5] These provisions remain in place and their applicability is not affected by the court of appeals' decision.

B. Factual Background.

The three respondents are longtime lawful permanent residents who were admitted to the United States as refugees from Vietnam. Pet. App. 5a-7a. All three face removal proceedings as a result of criminal convictions for which they served their sentences. *Id.*[6] Following completion

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[5] These regulations were recently strengthened to allow the automatic stay to continue after a release order is upheld by the BIA, so that the INS can seek certification of the order to the Attorney General. *See* 66 Fed. Reg. 54,909, 54,910 (2001) (codified at 8 C.F.R. pt. 3).

[6] Mr. Trung pled guilty to two charges of forgery, for which he was required to serve only 30 days. Pet. App. 6a. Mr. Nguyen pled guilty to the misdemeanor offense of threat/use of a dangerous weapon in a fight, for which he was sentenced to 365 days. Pet. App. 5a. At the age of 16, Mr. Hoang pled guilty to two counts of aggravated robbery, for which he received a ten-year sentence on each count, to be served consecutively. He was released after serving eight and a half years, based on good behavior. Pet. App. 6a.

of those sentences, the respondents were mandatorily detained by the INS for several months under Section 1226(c) until the district court, in three separate habeas actions, declared the statute unconstitutional and ordered that they be provided with individualized bond hearings. *Id.*

The government did not seek a stay of the district court orders. It also did not appeal administratively the subsequent determination by an immigration judge in each case that the respondents posed no danger or flight risk that required their detention. The respondents were thus permitted to post bond and are currently released. *Id.*[7] All three have been complying with their conditions of release and reporting for their hearings. None of the three has been ordered deported by an immigration judge, and all are eligible for – and seeking – various forms of relief from removal. *Id.*[8]

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[7] Mr. Trung was ordered released on a $7,500 bond, Mr. Nguyen on an $8,000 bond, and Mr. Hoang on a $20,000 bond. Pet. App. 5a-7a.

[8] All three respondents are eligible for relief under the Convention Against Torture; two of the three are also eligible for withholding of removal under 8 U.S.C. 1231(b)(3). Pet. App. 5a, 7a. In addition, two of the respondents are seeking post-conviction relief which, if granted, would mean that their convictions are not "aggravated felonies," thereby making them eligible for both cancellation of removal and asylum. *Id.* One of these, Mr. Trung, asserts that, even without post-conviction relief, his conviction does not constitute an "aggravated felony," since he received only a 30-day sentence. Pet. App. 7a. Were he to prevail on this claim, he would be eligible to apply for both a discretionary waiver of deportation and asylum. *Id.* The third, Mr. Hoang, also has a claim for a discretionary waiver of deportation under former 8 U.S.C. 1182(c) (1994) (repealed 1996), based on the fact that he pled guilty to his crime prior to 1996, *see INS v. St. Cyr*, 533 U.S. 289, 326 (2001) (holding that discretionary waivers under former Section 1182(c) remain available to aliens who pled guilty to their offenses prior to April 24, 1996). Mr. Hoang asserts that had the INS timely

(Continued on following page)

C. The Court of Appeals' Decision.

After consolidating all three cases, the court of appeals, in a unanimous opinion, affirmed the district court holdings that Section 1226(c) violates due process as applied to the respondents. Pet. App. 23a. The court of appeals first summarized the legislative background of Section 1226(c), noting that an earlier mandatory detention statute, enacted in 1988, had been declared unconstitutional by the majority of district courts that considered it, and was thereafter amended by Congress to permit the release of lawfully admitted aliens who could demonstrate lack of danger and flight risk. Pet. App. 2a-3a. The court also noted that Section 1226(c)'s mandatory detention requirement did not take effect until two years after IIRIRA's enactment, since Congress specifically provided for "transition period custody rules" (TPCR), which permitted the release on bond of criminal aliens who could demonstrate lawful entry and lack of danger or flight risk. Pet. App. 4a (citing IIRIRA 303(b)(3)).

The court of appeals then turned to its constitutional analysis of Section 1226(c). In light of this Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the court of appeals rejected the government's argument that aliens subject to Section 1226(c) have no fundamental liberty interest that is implicated by their detention. Pet. App. 11a-12a. The court found the government's reliance on *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999), misplaced, explaining that the Seventh Circuit's conclusion in *Parra* that aliens subject to Section 1226(c) have forfeited

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commenced removal proceedings, he would have been eligible for Section 1182(c) relief at that time, because he had not actually served five years.

any legal right to remain in the country, and thus that their liberty interests "are greatly diminished," was inconsistent with this Court's analysis in *Zadvydas*, where "[a] similar argument was recently rejected[:]"

> In *Zadvydas*, . . . the Court expressly rejected the government's position that "whatever liberty interest the aliens possess, it is 'greatly diminished' by their lack of a legal right to 'liv[e] at large in this country.'" . . . In the wake of the Court's ruling in *Zadvydas*, the vitality of the Seventh Circuit's holding in *Parra* is greatly diminished, as is the government's argument which relies upon *Parra*.

Pet. App. 12a.

The court of appeals emphasized that respondents "are not asserting that the Government has no right to detain them incident to their deportation proceedings," but rather that "they have a fundamental liberty interest that may not be arbitrarily infringed upon by the Government absent an opportunity for an individualized hearing to address risk of flight and danger to the public." Pet. App. 13a. In characterizing the liberty interest as "fundamental," the court distinguished it from the non-fundamental liberty interest in *Reno v. Flores*, 507 U.S. 292 (1993). Pet. App. 13a-14a. Quoting from this Court's opinion in *Flores*, the court of appeals noted that "'freedom from physical restraint . . . [was] not at issue'" in *Flores*, "'[s]urely not in the sense of shackles, chains, or barred cells,'" since at issue for the alien juveniles in that case was merely placement in licensed juvenile care facilities. Pet. App. 14a (citing *Flores*, 507 U.S. at 302). Moreover, "'juveniles, unlike adults, are always in some form of custody.'" *Id.* In contrast, the respondents here are adults who are "facing

physical restraint in the sense of shackles, chains, or barred cells." *Id.*

The court further emphasized the "fundamental" nature of the liberty interest by citing to this Court's decisions in *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992), *United States v. Salerno*, 481 U.S. 739, 750-51, 755 (1987), and *Zadvydas*, 121 S. Ct. at 2499. Pet. App. 15a. As a result, the court concluded that respondents have "a fundamental liberty interest in freedom from detention pending immigration proceedings that may only be infringed upon in certain limited circumstances." Pet. App. 15a.

The court of appeals next addressed the government's argument that Congress' plenary power over immigration limited the court's review over Congress' decisions with regard to immigration detention. Pet. App. 16a. Again relying on *Zadvydas* – where this Court addressed and rejected a similar argument – the court of appeals concluded that because Section 1226(c) "concerns the method by which the immigration statutes are implemented and not the political substantive decision of who is to be admitted or excluded . . . [it] must comply with the Constitution." Pet. App. 17a (citing *Zadvydas,* 121 S. Ct. at 2501, and *INS v. Chadha*, 462 U.S. 919, 941 (1983)). *See also* Pet. App. 16a ("[W]hile aliens are subject to the plenary power of Congress to expel them, Congress' implementation of this authority must comport with the Constitution.") (citing *Carlson v. Landon*, 342 U.S. 524, 534-37 (1952)).

The court of appeals then applied the due process test this Court re-articulated in *Zadvydas*. In doing so, the court gave weight to the government's "compelling interest in ensuring attendance by deportable aliens at deportation

proceedings" (Pet. App. 19a) as well as its "compelling interest in protecting the public from dangerous aliens." Pet. App. 21a. However, the court of appeals found that neither of these provided sufficient justification "to outweigh a lawful permanent resident alien's constitutionally protected liberty interest in avoiding physical restraint without an individualized determination of flight risk or danger to the public." Pet. App. 22a.

With respect to flight risk, the court of appeals rejected the government's argument that because "persons subject to [Section 1226(c)] are likely to be deported, they may be presumed to be flight risks." Pet. App. 19a. The court noted that the Senate Report cited by the government found a 20% failure to appear rate for aliens not detained during deportation proceedings, which "means that somewhere near 80% of non-detained aliens . . . did in fact appear." Pet. App. 20a. The court thus concluded that "[t]he risk of flight posed by some criminal aliens is insufficient to justify the mandatory detention of all aliens who meet the criteria under Section [1226(c)]." Pet. App. 21a.[9] In addition, the court noted that "[t]he fallacy in such a blanket assumption [of flight risk] is especially pertinent as applied to the [respondents]" since they "are currently pursuing avenues which, if successful, would lessen the probability that they will be deported or removed," and thus "have a significant incentive to attend deportation hearings." Pet. App. 20a.

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[9] The court further observed that, contrary to this Court's "express[ ] reject[ion] [of] the idea that intent to injure could be imputed to all aliens who were subject to deportation as members of the Communist Party" in *Carlson v. Landon*, 342 U.S. 524, 542 (1952), Section 1226(c) "impute[s] flight risk to all criminal aliens." Pet. App. 20a.

The court of appeals similarly rejected the government's contention that Section 1226(c) was necessary to protect the safety of the public, finding this argument even less persuasive. The court concluded that Section 1226(c)'s "blanket irrebuttable presumption that all those to whom it applies are dangerous" is "not justified by the nature of offenses which [it] encompasses" – which include fraud, tax evasion and perjury. Pet. App. 21a. The court drew further support for its holding from the results of respondents' individualized bond hearings, which refuted the government's contention "that they were such flight risks or so dangerous that mandatory detention was required." Pet. App. 22a.

Finally, the court considered, but rejected, respondents' argument that Section 1226(c) should be construed as not applying to the respondents, thereby allowing the court to avoid reaching the constitutional issue. The court characterized respondents' argument as requiring the court to construe Section 1226(c) as applying only to individuals "subject to a final order of removal," a construction which the court found was "plainly contrary" to Congress' intent. Pet. App. 23a.

REASONS FOR DENYING THE WRIT

The government is not seeking plenary review of the court of appeals' decision, but is asking that this petition be held pending disposition of the government's petitions in *Demore v. Kim* (No. 01-1491), and *Elwood v. Radoncic* (No. 01-1459), which also concern the constitutionality of Section 1226(c). This petition should be denied for the same reasons that both those petitions should be denied.

See Respondent's Brief in Opposition ("*Kim* Opp.") at 10-27, *Demore v. Kim* (No. 01-1491) (setting forth reasons for denying certiorari in *Kim)*; *id.* at 27-28 (summarizing additional reasons for denying certiorari in *Radoncic*).

1. First, there is no conflict among the courts of appeals that this Court needs to resolve. All of the courts of appeals to consider the constitutionality of Section 1226(c) since this Court decided *Zadvydas v. Davis*, 533 U.S. 678 (2001), agree that in light of the analysis in *Zadvydas,* Section 1226(c) violates due process. The Third, Ninth and Tenth Circuits each considered Section 1226(c) post-*Zadvydas* and reached this conclusion in unanimous decisions. *See Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001); *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002); and the case below, Pet. App. 1a-23a. The only court of appeals to uphold Section 1226(c), the Seventh Circuit in *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999), did so pre-*Zadvydas*, applying an analysis that cannot be reconciled with this Court's reasoning. *See Kim* Opp. at 12-14. Moreover, the circumstances in that case are in any event distinguishable because the alien conceded deportability and was not eligible for any relief from deportation. *See id.*

2. Second, the decision below – and the decisions of the two other circuits that considered Section 1226(c) post-*Zadvydas* – reflect a straightforward application of the legal standard enunciated in *Zadvydas,* as well as in this Court's prior detention cases such as *United States v. Salerno*, 481 U.S. 739 (1987), *Foucha v. Louisiana*, 504 U.S. 71 (1992), *Kansas v. Hendricks*, 521 U.S. 346 (1997), *Carlson v. Landon*, 342 U.S. 524 (1952), and *Reno v. Flores*, 507 U.S. 292 (1993). Indeed, the constitutional failure of Section 1226(c) is more fundamental than the

question that troubled this Court in *Zadvydas* since the statute provides *no* procedure whereby an individual can demonstrate suitability for release. For this reason, Section 1226(c) cannot survive even the more deferential due process test set forth in Justice Kennedy's dissenting opinion in *Zadvydas* (joined by Chief Justice Rehnquist), which focused on the importance of such procedural protections to ensure that detention is not "arbitrary." *See Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting). Notably, this Court has never upheld a detention scheme that prohibits any individualized determination of whether the purposes of detention are being served. *See Kim* Opp. at 15-21.[10]

3. Third, the court of appeals' decision in no way impedes the government's ability to detain and remove criminal aliens. Detention continues to be required of any alien who poses a danger or flight risk. *See* 8 C.F.R. 236.1(c)(8). The court's decision requires only an individualized determination by the Attorney General that detention is warranted on this basis. Moreover, the alien bears the burden of proof and must rebut the presumption of danger or flight risk. *Id.* Furthermore, the INS can appeal any immigration judge bond decision with which it disagrees, and

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[10] Indeed, even *Reno v. Flores*, 507 U.S. 292 (1993), which did not implicate the fundamental right to be free from physical restraint since it involved placement of alien juveniles in licensed juvenile care facilities rather than in "shackles, chains, or barred cells," *see* Pet. App. 13a-14a (citing *Flores*, 507 U.S. at 302), provided a means for the alien juveniles to rebut the presumption that they could only be released to a parent, legal guardian or other adult relative. *See Flores*, 507 U.S. at 297 (noting that regulation in question authorized discretionary release of alien juveniles to other non-related adults upon demonstrating "unusual and compelling circumstances") (citing former 8 C.F.R. 242.24(b)(4) (1992)).

"automatically stay" an alien's release pending such appeal. *See* 8 C.F.R. 3.19(f), 3.19(i)(2). Notably, in the instant case all three respondents were found suitable for release on bond after individualized hearings were conducted before an immigration judge. Although the INS could have appealed, and even stayed, these bond orders, it chose not to do so. *See also Kim* Opp. at 21-22.[11]

4. Plenary review is particularly premature in light of the possibility that legislation will be enacted that will significantly limit the scope of Section 1226(c). *See* H.R. 1452, 107th Cong. (2001). Under this legislation, longtime lawful permanent residents who have not been convicted of certain disqualifying aggravated felonies, or who are eligible to seek cancellation of removal based on "urgent humanitarian reasons or significant benefit," would be entitled to discretionary release from detention if they can demonstrate lack of danger or flight risk. *Id.* Each of the respondents here would be eligible for release under this legislation, thereby rendering this case moot. *See also Kim* Opp. at 3-4, 26 (noting that proposed legislation, if enacted, would moot Kim's case as well).

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[11] Moreover, the INS has many other means for ensuring removal of aliens. For example, the government recently promulgated new surrender regulations that impose new penalties on aliens who fail to comply with an order of surrender, in addition to the existing threat of criminal prosecution. *See* 67 Fed. Reg. 31,157 (2002) (proposed May 9, 2002) (to be codified at 8 C.F.R. pts. 3, 236, 240, & 241). In addition, an INS-contracted study conducted by the Vera Institute for Justice found a 92% appearance rate for criminal aliens who were released under a pilot project that included other incentives to appear. *See* Eileen Sullivan et al., Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program, 3, 36 (2000), *at* http://www.vera.org/publication_pdf/aapfinal.pdf.

Further, as noted, the post-*Zadvydas* courts of appeals are unanimous in finding Section 1226(c) unconstitutional. If a split were to emerge among the circuits, the Court will have ample opportunity to determine if plenary review is warranted, as the issue is currently pending in three other courts of appeals. *See Zgombic v. Farquharson*, No. 00-6165 (2d Cir.), *Welch v. Ashcroft*, No. 00-7665 (4th Cir.), *Ly v. Hanson*, No. 01-3016 (6th Cir.), and *Danesh v. Jenifer*, No. 01-1735 (6th Cir.). *See Kim* Opp. at 26-27.

5. The government has also filed a petition for a writ of certiorari in *Elwood v. Radoncic* (No. 01-1459), which it identifies as a companion case. For the same reasons set forth here, as well as in Respondent's Brief in Opposition in *Kim* (at 27-28), that petition should also be denied. As noted in the Brief in Opposition in *Kim*, the Third Circuit's *Radoncic* decision is a particularly inappropriate vehicle for addressing the issues raised by Section 1226(c) for at least three reasons: First, it is an unreported decision with no precedential effect either within or outside the Third Circuit. *See Radoncic v. Zemski*, 28 Fed. Appx. 113 (3d Cir. 2001) (designating decision as "unreported" and "not precedential"); 3d Cir. I.O.P. 5.3 (designating "unreported" decisions as "not precedential"); 3d Cir. I.O.P. 5.7 ("unreported opinions" are not binding precedent and are not cited as authority by the court). Second, the case presents a substantial mootness question since the government itself states that Radoncic is no longer subject to detention under Section 1226(c), having received a final BIA removal order. *See* Petition for a Writ of Certiorari in *Radoncic* at 21. *See also* Pet. Br. at 5 ("Detention of an alien following entry of a final order of removal is governed by . . . 8 U.S.C. 1231(a)."). Indeed, at the time of the Third Circuit's decision, Radoncic had already received this removal

order, and thus the case was arguably moot at the time. Finally, Radoncic was never properly subject to mandatory detention under Section 1226(c), since he was never charged with deportability on one of the grounds designated under the statute. *Cf. Matter of Ching*, 12 I. & N. Dec. 710, 712-13 (BIA 1968) (construing "is deportable" language in former suspension of deportation provision as requiring actual charge of deportability under the designated ground).[12]

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[12] The government initially charged Radoncic with removability under 8 U.S.C. 1251(a)(1)(B) (1994) (illegal entry), Pet. Br. in *Radoncic* at 5, and subsequently under an additional ground, Section 1251(a)(1)(E)(i) (1994) (alien smuggling), Pet. Br. in *Radoncic* at 6-7. Neither of these are grounds for mandatory detention under Section 1226(c).

CONCLUSION

In sum, in light of this Court's decision in *Zadvydas*, and the other reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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